IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 1139 of 1993

For Approval and Signature:

HONOURABLE MR.JUSTICE A.L.DAVE
HONOURABLE MR.JUSTICE SHARAD D.DAVE

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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BABUBHAI @ VISHNUBHAI KHENGARBHAI RABARI - Appellant(s)
Versus
STATE OF GUJARAT - Opponent(s)

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Appearance :
MR KJ SHETHNA for Appellant(s) : 1,
Mr.A.J.Desai, APP for Opponent(s) : 1,

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CORAM : HONOURABLE MR.JUSTICE A.L.DAVE

and

HONOURABLE MR.JUSTICE SHARAD D.DAVE

Date : 27/06/2007

ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE A.L.DAVE)

1. The appellant came to be tried by the Sessions Court, Nadiad for the offence of murder of one Laljibhai Hartanbhai Rabari allegedly committed by the appellant on 24.10.1991 at about 18.30 hours near Vidhyutnagar Society located on Petlad Road at Nadiad by inflicting knife blows on the deceased. The trial Court accepted the prosecution case and convicted the appellant for the said offence and sentenced him to undergo imprisonment for life by judgment and order dated 30.9.1993 in Sessions Case No.113 of 1992.

2. The prosecution case in brief is that the appellant and the deceased Laljibhai belong to the same community. Prior to the date of incident, they had some dispute on grazing of cattle. Keeping that in mind, it is alleged that when the deceased was returning home after selling milk and was passing by Vidhyutnagar society, the appellant ran after him and inflicted two knife blows on chest of deceased, as a result, the deceased fell down. As per the prosecution case, the incident was witnessed by Laxmanbhai Bhulabhai Rabari and Hemrajbhai Rupabhai Rabari. It is further the case of the prosecution that the deceased was taken to hospital by Pravinbhai Rupabhai Rabari and Bhanuben Bhagwanbhai Rabari. The deceased made oral dying declaration before both of these witnesses implicating the appellant. The deceased was initially taken to Civil Hospital,

Nadiad and from there he was shifted to the hospital of Dr.Pandhi at Nadiad. In the meantime, the police was informed. The police came and recorded the FIR of the deceased wherein also the deceased implicated the appellant. The message was sent to the Executive Magistrate for recording dying declaration who recorded the dying declaration (which is at Exh.17) wherein also the deceased implicated the appellant. Blade of knife was recovered by the police and handle of the knife was discovered by the accused after arrest. The muddammal recovered was sent to the FSL and it was found that the knife, shirt, lungi, banian and ring all carried human blood of group `A'.

3. The police having found sufficient evidence against the accused filed chargesheet in the court of Chief Judicial Magistrate, Kheda at Nadiad, who in turn, committed the case to the court of Sessions and Sessions Case No.113 of 1992 came to be registered.

3.1 Charge was framed against the accused at Exh.4. Accused pleaded not guilty to the charge and came to be tried. The trial Court accepted the prosecution case against the appellant and recorded the conviction of the appellant by judgment and order dated 30.9.1993 which is the subject matter of challenge in this appeal.

4. Learned advocate Mr.Shethna appearing for the appellant submitted that the trial Court has not believed the evidence of the eye witnesses but has

recorded the conviction on basis of dying declarations – both oral and written. Mr.Shethna submitted that dying declarations exclude the possibility of presence of eye witnesses. The dying declarations also exclude the possibility of involvement of the accused for want of proper identity of the assailant. It was also submitted that if the knife had broken in the episode as is alleged by the prosecution, it certainly would have resulted into some injury to the assailant whereas the accused appellant is not alleged to have suffered any injury in the incident. It was also contended that the place of incident was indicated by one Dinesh Parekh who also claimed to be an eye witness to the incident has not been examined by the prosecution. All these aspects have been overlooked by the trial Court.

4.1 Mr.Shethna, learned advocate for the appellant submitted that even if the prosecution case is taken at its face value, offence under Section 302 would not be constituted. It can be either an offence punishable under Section 324 of IPC or 304-Part-I or II of IPC. Mr.Shethna submitted that the appellant has remained in jail for nearly 23 months during the trial period. He was, however, bailed out by this Court by order dated 4.11.1993. Mr.Shethna submitted that if the Court comes to the conclusion that the offence under Section 304-Part I or II is constituted, the appellant may be awarded the sentence already undergone by him and in such an

eventuality, the Court may award compensation to the victim's family.

4.2 Mr.Shethna has indicated that the appellant has a gross income of about Rs.3000/- from running STD PCO. He is aged 38 years presently. He got married after being released on bail and has a son aged 12 years and daughter aged 10 years. His wife is a house-wife. Son is studying in Standard VII and daughter is studying in Standard V. He passed his B.Com. examination while he was in jail in the year 1992. He says that he is staying separately from his parents and that appellant has no other criminal antecedent. Mr.Shethna, therefore, submitted that the case of the appellant may be considered sympathetically and appeal may be allowed.

5. Learned APP Mr.Desai has opposed this appeal. According to him, the case would squarely fall within the ambit of definition of murder punishable under Section 302 of IPC. According to Mr.Desai, it has come in evidence that the houses of both the appellant as well as the victim are in vicinity of the area where the incident occurred. At the time of incident, the appellant chased the deceased and inflicted two knife blows which ultimately resulted into death of the deceased. Though one of the injuries is superficial, one injury is of a serious nature which has ultimately resulted into death of the deceased. The knife blow has penetrated deep into the thoracic cavity which would

reflect that the knife blow was given with force. Mr.Desai submitted that this reflects intention of the appellant to cause death of the deceased and he has inflicted two blows to ensure that the deceased ultimately succumbs to the injuries. By way of alternative submission, it was submitted by Mr.Desai that, at least, knowledge on part of the appellant that his act is likely to result into death of the deceased can be inferred. The case, therefore, would fall either in clause I or clause II of Section 300. It was also submitted that the case does not fall under any of the exception to Section 300 and therefore, the trial Court was justified in convicting the appellant for the offence of murder.

5.1 To meet with the contention raised by learned advocate Mr.Shethna that dying declaration rules out the possibility of presence of eye witnesses as the deceased has stated that he was all alone, Mr.Desai has relied upon the decision in the case of Heeralal Yadav V/s State of M.P., and others, reported in AIR 2006 SC 2535 and submitted that non-mention of name of the other persons who were present by the deceased in his dying declarations would not necessarily indicate absence of those persons. Mr.Desai further submitted that if the evidence is seen, the deceased was going all alone and eye witnesses were at a distance and, therefore, when asked as to who was there, he naturally would have said that he was alone. Mr.Desai submitted that even if the evidence of eye witnesses is not accepted as

is done by the trial Court, the evidence of two witnesses before whom oral dying declaration is made viz., Pravinbhai and Bhanuben and the evidence in respect of dying declaration before the Executive Magistrate is strong enough to show indisputable involvement of the appellant in the incident and, therefore, the conviction may be upheld.

5.2 Mr.Desai reflecting on aspect of compensation submitted that it is almost 16 years to the incident and paying monetary compensation to the family of the victim may not serve the purpose as the sufferance that family had to undergo has already been suffered. He submitted that in event the Court comes to the conclusion that the case does not fall within the ambit of Section 302 of Indian Penal Code but falls under any of the other offences and compensation is required to be awarded, an amount of Rs.1,00,000/- may be awarded.

6. We have examined the record and proceedings in light of the rival side submissions.

7. If we consider the medical evidence, there are depositions of three doctors.

7.1. Dr.Kokilaben Jayantilal Shah Exh.9 is the Medical Officer who had performed the post-mortem. According to her, there were two injuries found on chest of the deceased. The first injury was on right side of the chest about 3 inches above the nipple

which was sutured. The second injury was in the centre of the chest. There was an internal injury corresponding to the first external injury on the right side of the chest. According to the doctor, the death of the deceased occurred because of hemorrhagic shock due to the injury on chest. The doctor has stated that because the wounds were sutured, she cannot opine as to the nature of the weapon used for causing such injury. She also stated that she cannot give a definite opinion as to whether the injuries were sufficient in ordinary course of nature to cause death. She has been cross-examined and during cross-examination, she states that she does not agree with a proposition that the internal injury noticed on person of the deceased would not result into death. In such injuries, death may or may not result. She has stated that the blood group of the deceased was `A' positive. The P.M.Notes are at Exh.12.

7.2. Dr.Nasar has been examined at Exh.25. He was Medical Officer at Civil Hospital, Nadiad on 24.10.1991 when the deceased was taken to the hospital by his relatives. The doctor says that he noticed following injuries :

> (i) An incised wound admeasuring 1″ x 1/2″ on right side of the chest at a distance of 3″ from the nipple, the depth of which was more than the size of an index finger. It was a bleeding injury going towards back from front internally.

(ii) an incised would in the centre of the chest admeasuring 1/2″ x 1/2″ which was muscle deep.

The injuries were possible by a sharp cutting instrument. He says that two bottles of blood were given to the patient. During cross-examination, he states that muddammal article no.1 knife may cause a puncture wound if injury is caused by piercing such a weapon. That part of the weapon which goes deep into the body would get stained with blood.

7.3. Dr.Dineshkumar Pandhi is examined at exh.27. He states that the deceased was treated by him in his private hospital. He noticed a sutured wound on right pactoral region of the deceased and another wound in the centre of the chest admeasuring ½ “ which was also sutured. According to him, the injuries found on person of the deceased were not sufficient in ordinary course of nature to cause death.

8. What emerges from this medical evidence is that the deceased died because of hemorrhagic shock attributable to the injury found on his person. It is nobody's case that the injuries were either accidental or self inflicted. Under the circumstances, when possibility of accidental or suicidal death is ruled out and death is found to be unnatural, then necessary inference is that the death of the deceased was homicidal.

9. Now comes the question as to who can be attributed with the cause of death. In this regard, the prosecution has led evidence in form of deposition of eye witnesses. They are P.W. 5 Laxmanbhai Rabari Exh.29 and P.W.6 Hemrajbhai Rabari Exh.30. The prosecution has also led evidence in form of dying declarations. There are two witnesses namely Pravinbhai Rabari and Bhanuben Rabari who have deposed that the deceased gave oral dying declaration before them implicating the appellant. There is deposition of Safimiya Malek Exh.13 who had recorded the dying declaration of the deceased in the capacity of an Executive Magistrate. The said dying declaration is at Exh.17 and last but not the least, the FIR is given by the deceased which is at Exh.48 which was recorded by Bhim Bahadur Shahi whose deposition is at Exh.47.

10. If the evidence of Pravinbhai Rabari is seen which is at Exh.31, he says that he was washing his hands at his home at 6.30 in the evening when he heard shouts of deceased Laljibhai calling Dilip-Dilip. In that direction, he found that something was wrong with Laljibhai. Therefore, he told his aunt Bhanuben that something has happened to Laljibhai and, therefore, he and his aunt both rushed outside. He found that Laljibhai was in front of Vidhyutnagar Society and was profusely bleeding. Someone called an auto-rickshaw and, therefore, he and his aunt took Laljibhai in the auto-rickshaw to the Civil Hospital.

Laljibhai was conscious. His relatives were keen on taking Laljibhai to Yogi Surgical Hospital and, therefore, he and his aunt went home. Deceased Laljibhai and Khengarbhai (father of the appellant) had some dispute on grazing of cattle and, therefore, Babubhai had caused injury to deceased Laljibhai. The witness says that when he lifted Laljibhai, a knife without handle fell out of his clothes which was picked up by his aunt.

10.1. During cross-examination, he states that he had inquired of deceased Laljibhai as to what happened and Laljibhai told him that Khengarbhai's son has caused him injury. This dialogue took place while the deceased was taken in auto-rickshaw to the hospital. On being probed further, he states in his cross-examination that this dialogue took place just when the auto-rickshaw was descending the slope of the road leading to the Civil Hospital from the main road. He had not inquired from Laljibhai as to the cause for the incident. Several questions have been put to this witness but nothing emerges in cross-examination to doubt the veracity of the witnesses.

10.2. Bhanuben is at Exh.32. She says that she was milching buffalo. At that time, Pravinbhai informed that something has happened. Therefore, she and Pravinbhai went in the chowk of the Vidhyutnagar society where they found Laljibhai profusely bleeding. She says that she inquired as to what had happened and at that time Laljibhai said that

Khengar's son Babu had inflicted knife blows on him. She and Pravin took Laljibhai to Civil Hospital, Nadiad in an auto-rickshaw. On the way to the Civil Hospital, Pravinbhai asked Laljibhai as to what had happened and Laljibhai said that Khengarbhai had some altercation about grazing of cattle and, therefore, his son has inflicted two knife blows. This witness is also cross-examined but she sticks to her version about oral dying declaration.

10.3. Despite close scrutiny of depositions of Pravinbhai and Bhanuben, we are unable to find any material which would render the depositions doubtful. Their depositions have come in a natural way and corroborate each other in every aspect at least so far as oral dying declarations are concerned.

11. Now, going to the deposition of the Executive Magistrate – Safimiya Malek Exh.13, we find that he was in the Civil Hospital for recording dying declaration in another case when he received a yadi for recording the dying declaration of deceased Laljibhai Hartanbhai. On receiving the yadi, he got in touch with the doctor. The doctor said that the patient is conscious and put an endorsement to that effect on Exh.14 - yadi which was put at 7.50 hours. Thereafter, he went to the room and asked the relatives to leave the room. Thereafter, when there was no one else in the room, he started recording the dying declaration. The patient was fully conscious. The witness says that the declarant gave his name as

Laljibhai Bharwad, resident of Kheda Zilla Madhyashta Society, B/h Vidhyutnagar Society, Block No.15. The witness says that he recorded the dying declaration in words of the declarant in question – answer form. He says that deceased told him that on the day of incident i.e., on 24.10.1991 at about 6.30 p.m., Babubhai @ Vishnubhai s/o Khengarbhai had inflicted two knife blows on his chest in front of Vidhyutnagar society while he was returning home after giving milk. The witness says that he had recorded the dying declaration in his own handwriting and had obtained signature of Laljibhai Hartanbhai which was put by him in his presence. Recording of dying declaration was over at 20.10 hours. The witness has been cross-examined at length on procedure followed him, about consciousness of the deceased but he sticks to his version totally unshaken.

11.1. This dying declaration is sought to be assailed by the appellant on the ground that it excludes the possibility of implication of accused-appellant for want of identity evidence. However, we find that identity of assailant is clearly given by the deceased in dying declaration namely Babubhai @ Vishnu s/o Khengarbhai. It was vehemently argued that Nadiad is a reasonably big town and there could be many Babubhai and there could be many Vishnubhai and there could be many Khengarbhai but we are unable to locate even a suggestion during cross-examination on this aspect. It has not been put to any witness, that there was some other Babubhai who was also known as

Vishnubhai and whose father's name was Khengarbhai. It is not possible to accept this contention in light of the above factual situation.

11.2. The dying declaration is to some extent relied upon by the learned advocate for the appellant to contend that it excludes the possibility of presence of eye witnesses Laxmanbhai and Hemrajbhai because in the dying declaration, when it was put to the deceased that who was present at the time of incident, he has replied that at that time, he was alone. We are unable to accept this contention either, for the reason that it has remained unchallenged that the deceased was going all alone at the time of the incident. From the evidence of Laxmanbhai and Hemrajbhai, it is clear that they were not going along side with the deceased nor were they in company of the deceased but they saw the incident from a distance. Therefore, when it was put to the deceased as to who was present at the time of the incident, he would obviously say that he was alone. The incident has occurred on a public road in the evening and obviously there would be many more persons on the road. The contention regarding the dying declaration ruling out the possibility of presence of Laxmanbhai and Hemrajbhai, therefore, cannot be accepted.

11.3. There is no other contention raised to assail the dying declaration before Executive Magistrate. The Executive Magistrate has before

recording the dying declaration obtained the opinion of the doctor about consciousness. He was himself also satisfied about the consciousness of the deceased and ability to give declaration. Under the circumstances, the dying declaration has to be accepted which clearly implicates the appellant and the trial Court was, therefore, justified in accepting the dying declaration before the Executive Magistrate.

12. Apart from the dying declaration recorded by the Executive Magistrate, Police Officer Shahi Exh.47 has deposed that he recorded the FIR given by the deceased. Presently, leaving aside the question whether it can be termed as a FIR or not, it still assumes shape of dying declaration. It is at Exh.48. Therein also, the deceased has clearly indicated that when he was returning home after giving milk and was passing by Vidhyutnagar Society, Babubhai @ Vishnubhai Khengarbhai who is his caste fellow came suddenly running and inflicted knife blows on his chest and ran away. He says that he, therefore, fell down. He was taken to Civil Hospital by Pravinbhai and he says that the incident occurred because of previous quarrel with Khengarbhai father of Babubhai @ Vishnubhai – the accused. P.S.I.Shahi says that he recorded the FIR of Laljibhai and obtained signature of deceased Laljibhai in his presence and he proves the same in the Court. We have given a close scrutiny to the deposition of this witness, particularly, the cross-examination and we find that there is no

serious challenge to the contents of the said FIR or the procedural part. An objection was raised on aspect that this cannot be treated as FIR and cannot be exhibited but as discussed by us earlier, whether exh.48 can be treated as FIR or not is certainly has to be treated as dying declaration. Said Exh.48 also clearly implicates the appellant of having inflicted the blows on the deceased which ultimately resulted into his death.

13. It was vehemently contended that even if the involvement of the appellant is taken as having been duly proved by the prosecution, offence of murder cannot be said to have been constituted and trial Court ran into an error in convicting the appellant under Section 302 of Indian Penal Code. In support of the above contention, it was contended that the medical evidence does not clearly opine that the injuries were sufficient in ordinary course of nature to cause death. Only one injury is indicated to be fatal an if that be so, it would only constitute an offence of hurt by a deadly weapon or at the most an offence of culpable homicide not amounting to murder.

13.1. We are unable to accept this contention of learned advocate for the appellant for the reasons that would follow.

13.2. The evidence is clear that the deceased was going home after giving milk. He was all alone when suddenly the appellant ran to him with a knife in his

hand and inflicted two blows. Both the blows were inflicted in chest. They are inflicted with such a force that knife broke into two pieces. The blow is given with such a force that it has penetrated into the thoracic cavity, the depth of which was more than index finger. This naturally would cause damage to vital organ of the body. It is true that the medical evidence is to the effect that it cannot be said for certain that the injuries were sufficient in ordinary course of nature to cause death but it is equally true that as per the medical evidence, these are the injuries which have caused death of the deceased. If Section 300 of Indian Penal Code is seen, it defines murder. It is clearly stated that except in the cases excepted in the section, culpable homicide is murder if the act by which death is caused is done with intention of causing death or if it is done with an intention of such bodily injury as offender knows to be likely to cause death of the person to whom harm is caused. The intention of the assailant or knowledge on part of the assailant that the injuries likely to cause death of the person to whom it is caused is a mental phenomena in respect of which there cannot be any direct evidence. It has to be inferred from the conduct of the assailant and surrounding circumstances. If the evidence in this regard in the instant case is seen, it is clear that the deceased was walking home unarmed, undefended and all alone. At that time, the appellant ran to him armed with a knife and inflicted two injuries on chest. The injuries were thus caused on vital part of

the body with deadly weapon namely knife, blade of which was 5” in length and 2 cm., in width. The injury was caused with such a force that it penetrated deep into thoracic cavity. This was done by the accused appellant without any proximate cause offered by the deceased. In this set of circumstances, we are of the view that the injuries were caused by the appellant with an intention of causing death or at least with a clear knowledge that it is likely to cause death of the person to whom the harm is caused. The case would, therefore, fall within the definition of murder (incidentally it is not even canvassed that any of the exceptions to Section 300 is attracted). In light of the above discussion, we do not find merit in the contention that the case would not fall within the definition of murder and may fall within the definition of either simple hurt or culpable homicide not amounting to murder.

14. Apart from the above aspects, there are certain other circumstantial pieces of evidence which implicate the appellant namely the discovery of the blade of the knife by the appellant and presence of blood on the blade of the knife of the group of the deceased.

15. It was contended that since the knife had broken in the incident, if it was used by the appellant, the appellant would have suffered some injury on his hand which was found to be absent and,

therefore, the involvement of the appellant becomes doubtful. In our view, the contention cannot be accepted in the facts of the present case because this contention is founded on hypothesis as against strong, consistent and trustworthy evidence against the appellant in form of two oral dying declarations and two written dying declarations one before the Police Officer and another before the Executive Magistrate.

16. The evidence against the appellant in above form is strong enough to uphold the conviction recorded by the trial Court even while ignoring the evidence of eye witnesses Laxmanbhai and Hemrajbhai. Even the trial Court has not relied on their evidence. We do not propose to deal with that evidence any further in light of the above clinching evidence against the appellant.

17. We have gone through the judgment and order of the trial court. We are broadly in agreement with the reasoning adopted by the trial Court and conclusions arrived at by the trial Court. We do not find any merit in the appeal. The appeal, therefore, has to fail.

18. This appeal is dismissed. The judgment and order passed by the learned Additional Sessions Judge, Nadiad on 30.9.1993 in Sessions Case No.113 of 1992 is hereby confirmed.

19. The appellant was released on bail by this Court by order dated 4.11.1993. His bail bond shall now stand cancelled. He is directed to surrender to custody within three weeks from today.

(A.L.DAVE, J)

(SHARAD D DAVE, J)

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